SINNATHAMBY & ANOR. v. LEE CHOOI YING

BRIJKISHORE & ANOR. v. LEE CHOOI YING

[S.C. (Mohamed Azmi, Syed Agil Barakbah & Wan Hamzah S.C. JJ.) January 30 & June 20, 1986]

[Kuala Lumpur – Supreme Court Appeals Nos. 366 &°367 of 1986]

Practice and Procedure – Appeal – Summons in Chambers heard in open court – Order in open court – Time for appeal runs from date of judgment – Amount or value of subject matter less than $100,000 – Leave to appeal – Notice of appeal filed out of time – Discretion to extend time to file notice of appeal – R.H.C. 1980, O. 32 r.11 – Rules of the Supreme Court 1980, rr. 49, 56 & 62 – Courts of Judicature Act, 1964, s. 68(1) (a).

In these cases Anuar J. after hearing a preliminary objection by the respondent in open court, ordered that the writ of summons and statements of claim of the appellants be struck out and judgment be entered in the respondent's favour against the appellants on the counter claim. The said order was made pursuant to the respondent's summons in chambers, which was directed to be heard in open court. As the amount or value of the subject matter at the trial was less than $100,000 the appeal could only be brought with leave of the Supreme Court or a judge of the High Court. Leave to appeal was obtained by the appellants from the judge of the High Court but owing to a misunderstanding of the rules applicable the notice of appeal was filed out of time.

Held: (1) there can be no doubt that the order obtained in this case was an order in open court and for the purpose of calculating the period of one month within which to appeal, paragraph (c) of Rule 56 of the Rules of the Supreme Court is applicable, that is from the date of the order appealed from;

(2) in this case the notice to appeal was filed out of time albeit wrongly but since leave to appeal had been obtained, there was in all the circumstances sufficient ground for granting the appellants leave to appeal out of time.

Cases referred to:

(1) *Tractors Malaysia Bhd.* v. *Southern Estates Sdn. Bhd. & Anor.* [1984] 1 M.L.J. 118.
(2) *Re Coles & Ravenshear* [1907] 1 K.B. 1.
(3) *Chong Kueng Ying & Ors.* v. *Lovis Lavagna* [1972] 1 M.L.J. 180.
(4) *Gatti* v. *Shoosmith* [1939] 3 All E.R. 916.
(5) *Palata Investments Ltd. & Ors.* v. *Burt & Sinfield Ltd. & Ors.* [1985] 2 All E.R. 517.

SUPREME COURT.

Liza Chan (*Miss*) for the applicants/respondent.

Lim Kean Chye (*H.L. Sharma* with him) for the appellants.

Cur. Adv. Vult.

Mohamed Azmi S.C.J.: By these two Notices of Motion dated December 31, 1985 which are heard together by consent, the respondent/applicant [the successful defendant in the High Court] prays for an order that the appeal of the appellants/plaintiffs in both cases be set aside or dismissed on the grounds that the appellants (i) have not obtained leave to appeal under section 68(1) (a) of the Courts of Judicature Act 1964 (ii) have not complied with rule 56 of the Rules of the Supreme Court 1980 and (iii) have not complied with rule 62 of the said Rules. Both the applications have been dismissed, and I now set out my reasons.

At the outset, Miss Liza Chan, counsel for the respondent has abandoned ground (i) since the appellants have apparently obtained leave to appeal from Anuar J. in the High Court at Ipoh. Thus although the value of the subject matter at the trial is less than $100,000.00, the matter is now appealable under section 68(1) (a). Nor is ground (iii) pursued in the course of argument. In the event, I need only deal with ground (ii) on the issue of whether the court should strike out the appeals or allow the appellants leave under rule 56 RSC 1980 by extending the time limited for appeal.

On ground (ii), two questions have arisen. The first is where as in the present case, leave to appeal is required under section 68(1) (a) of the Courts of Judicature Act 1964, can notice of appeal be filed before the said leave is obtained? Rule 49(1) RSC 1980 provides:

"Appeals to the Court . . . . . *shall be brought* by giving notice of appeal."

But section 68(1) (a) provides that, "No appeal *shall be brought* to the Supreme Court" when the amount or value of the subject matter at the trial is less than $100,000.00, except with leave of the Supreme Court or a judge of the High Court. Reading these two provisions together, it is explicit that leave to appeal must first be obtained before notice of appeal can validly be filed and served, although the time limited for appeal would run from the various events specified in rule 56 RSC. [See *Tractors Malaysia Bhd.* v. *Southern Estates Sdn. Bhd. & Anor*(1)].

The facts of the present case show that on September 23, 1985 Anuar J. after hearing a preliminary objection by the respondent in open Court, ordered that the writ of summons and

statement of claim of the appellants be struck out, and that judgment be entered in the respondent's favour against the appellants on the counter claim. This is the order which the appellants wish to appeal against. Although the said order was made pursuant to the respondent's summons in Chambers, there is a dispute as to whether the said order was an order in Chambers or an order in open Court. It would appear that the respondent's summons in Chambers was directed by the learned judge to be heard in open Court under Order 32 rule 11(1) RHC 1980, and the order as extracted and exhibited in the affidavit of the appellants clearly shows that it is an order pronounced in open Court. In my view, there can be no doubt that the order of September 23, 1985 is an order in open Court, and for the purpose of bringing an appeal, the requirements of section 68(2) of the Courts of Judicature Act which applies only to order made in Chambers need not be complied with. That sub-section provides:

"No appeal shall lie from an order made by a Judge of the High Court in Chambers unless the Judge has certified, after application within four days after the making of the order by any party for further argument in Court, that he requires no further argument, or unless leave is obtained from the Supreme Court or from a Judge of the High Court".

It also follows that being an order in open Court, for the purpose of calculating the one month period within which to appeal under rule 56, paragraph (c) and not paragraph (a) of that rule is applicable which means that time runs "from the date on which the judgment or order appealed against was pronounced", in this case September 23, 1985. Rule 56 as amended by P.U (A) 222/80 with effect from August 1, 1980 provides:

"No appeal shall, except by leave of the full Court, be brought after the expiration of one month –

(a) *in the case of an appeal from an order in Chambers, from the date when such order was pronounced at the hearing or after the hearing in open Court* or after the issue of the certificate by the Judge that he requires no further argument, whichever is the later or when the appellant first had notice thereof;

(b) in the case of an appeal against the refusal of an application, from the date of such refusal;

(c) in all other cases, from the date on which the judgment or order appealed against was pronounced."

[emphasis supplied]

Mr. Lim Kean Chye, counsel for the appellants in SCCA No. 366/1985 drew the court's attention to the words "after the hearing in Open Court" in paragraph (a) of rule 56 for his contention that an order in open Court can fall within the ambit of that paragraph. It is further submitted that by issuing a certificate under section 68(2) the learned judge is treating the case as still a Chamber matter and as such time starts to run from the date of its issue. I do not agree. For reason already stated, section 68(2) certificate is unnecessary in this case, and the fact that it is applied for and issued by the learned judge cannot change the character and status of the open Court order. It is explicit that paragraph (a) of rule 56 is applicable solely to an appeal from an order in Chambers and that it cannot cover any appeal from an order in open Court although such order is made pursuant to a summons or application in Chambers. The words "after the hearing in open Court" are subject to the governing words "in the case of an appeal from an order in Chambers" appearing at the beginning of paragraph (a). Order 32 rule 11 RHC 1980 provides:–

"(1) The Judge in Chambers may direct that any summons, application or appeal shall be heard in Court or shall be adjourned into Court to be so heard if he considers that by reason of its importance or for any other reason it should be so heard.

(2) Any matter heard in Court by virtue of a direction under paragraph (1) may be adjourned from Court into Chambers."

It seems to me that, the words in rule 56(a) referred to by Mr. Lim Kean Chye are intended to include a situation where after the hearing in open Court under rule 11(2) the matter is adjourned into Chambers where an order is eventually pronounced. In my view, on basic principle of interpretation, the words "hearing in open Court" should not be extended to include an order in open Court, and the words "an appeal from an order in Chambers" in rule 56(a) should be given their ordinary and plain meaning. In the circumstances, the notice of appeal filed by the appellants on October 28, 1985 against the order of September 23, was made four days out of time by virtue of rule 56(c). However, as adverted to earlier, even if the notice had been filed within the strict time limit, it would be of no effect on the ground that the value of the subject matter at the trial is less than $100,000/- and at the time of filing leave to appeal was yet to be obtained under section 68(1)(a).

The second question is, where leave to appeal either under sub-section (1), (2) or (3) of section 68 has been obtained but the time to file notice of appeal has expired which is the case here, under

what circumstances would the court exercise its power in granting an appellant extension of time to file notice of appeal? Miss Liza Chan argues that the court should not grant the extension in this case because the delay was caused by the mistake of the appellants' solicitors in applying for extension of time to the High Court in the first instance instead of applying direct to this court as required by rule 56. Learned counsel relies on the *Malayan Law Journal's* headnote no. (4) in *Tractors Malaysia Bhd.* v. *Southern Estates Sdn. Bhd. & Anor* (*ante*) for the proposition that the appellants must show "special grounds" before extension of time to file notice of appeal can be granted. That case ruled *inter alia* that "mistake of appellants' solicitors on point of law by itself cannot constitute sufficient grounds for granting extension of time to file notice of appeal." There, the effect of granting extension of time as a result of the mistake of the legal adviser, would have been to allow the notice of appeal to be filed more than three years out of time. There was an inordinate delay in obtaining leave in lieu of certificate under section 68(2). Whereas in the present case, the delay in complying with rule 56 RSC 1980 is due not only to the time taken in obtaining section 68(1) (a) leave, but also to the mistake of the appellants' solicitors in applying for rule 56 leave from the High Court instead of directly from this court. In my view, for the purpose of rule 56, an applicant is required to show sufficient ground in his application, and what is sufficient ground must necessarily depend on the facts of each case. But, in general, delay in filing the necessary motion whether for leave to appeal or for extension of time, is invariably fatal, and in such cases the mistake of the appellants' solicitors on point of law by itself cannot constitute sufficient ground for granting the application. Other factors like the length of delay and the likelihood of prejudice to the other side must also be considered.

Under rule 13 of the repealed Federal Court (Civil Appeals) (Transitional) Rules 1963, "special leave" of the full court was required to bring an appeal out of time, but under the present rule 56 of Rules of the Supreme Court 1980 the word "special" has been omitted, and because of this change in the law which requires only ordinary leave, it is argued that the mistake of a legal adviser is no longer a ground for refusing an application for extension of time to appeal. In my view this is not so, for the effect of the change in the law merely widens the court's unfettered discretion under rule 56. In exercising its discretion, the court would *inter alia* consider the reason for the delay, the length of the delay and the likelihood of prejudice to the successful party in the court below. In view of the change in the law which no longer requires "special leave", where the mistake of a legal adviser is advanced as the reason for the delay, the Court is now free to consider it on its merits in the same manner that the court would exercise its discretion in other cases. Thus, the ruling in *Re Coles & Ravenshear*[2] and as well as *Chong Kueng Ying & Ors.* v. *Lovis Lavagna*[3], which excluded the court's discretion in cases where the delay was caused by the mistake of a legal adviser, should no longer be applicable after the coming into force of the Supreme Court Rules 1980. For the purpose of rule 56, this court should be guided by the principle adopted by the Court of Appeal in England after the 1909 amendment of the English RSC as to extension of time for appeal. In *Gatti* v. *Shoosmith*[4], the Court of Appeal allowed extension of time where the delay was only a matter of a few days and the appellants' solicitor, within time, had informed the respondent's solicitors by letter of their intention to appeal. On the facts of that case, although the notice of appeal was not served within the strict time, due to the appellants' solicitor misunderstanding of the law, the court exercised its discretion in granting leave to appeal out of time. But *Gatti's* case is no authority for the proposition that because of the change in the law from special to ordinary leave, the court has no more discretion to refuse an application under rule 56 where the delay is caused by the mistake of a legal adviser. This is made clear in the judgment of Sir Wilfrid Greene M.R. at page 919 where he said:

> "On consideration of the whole matter, in my opinion under the rule as it now stands, the fact that the omission to appeal in due time was due to a mistake on the part of a legal adviser may be a sufficient cause to justify the court in exercising its discretion. I say "may be" because it is not to be thought that it will necessarily be exercised in every set of facts."

In *Palata Investments Ltd & Ors.* v. *Burt & Sinfield Ltd & Ors.*[5], the English Court of Appeal, following *Gatti's* case also exercised its discretion in favour of the appellants where the delay was held to be an exceptional one *viz*, merely three days out of time, and the respondent's solicitors knew that there was in all likelihood to be an appeal, so that prejudice to the respondent was non-existent.

It is relevant to note that there are two distinct types of leave that may be required by an appellant – (1) leave to appeal under section 68 read with

rule 60 and (2) leave to bring appeal out of time under rule 56 RSC. Under (1) leave to appeal is required only in respect of non-appealable matters as enumerated in section 68; whereas under (2) leave of the full Court for extension of time is required whether the appeal is as of right or with leave. Further, unlike application for leave under rule 56, section 68 leave application must first be made to the High Court and not direct to the Supreme Court as required by section 43 and rule 58. In the instant case the mistake of the appellant's solicitors in making rule 56 application to the High Court is not really material because in any event the appellants can only file their notice of appeal after they have obtained leave to appeal under section 68(1) (a). The appellants obtained leave of the High Court on November 1, 1985. Having obtained such leave to appeal, the only question is whether the court should in the circumstances, exercise its discretion to extend time under rule 56, notwithstanding the delay of about three months from the date of obtaining leave up to today. Where leave to appeal has been obtained, I am of the view that the discretion under rule 56 should be exercised as a matter of course, unless the other party is thereby prejudiced or there are good reasons for refusing the extension. Here, the appellants had first to apply for section 68 leave in the High Court before coming to this court for extension of time under rule 56. The open Court order appealed against was pronounced on September 23, 1985, and the appellants filed their notice of appeal albeit wrongly, only a few days out of time on October 28, 1985, a copy of which was served on the respondent. The appellants would have been within time had it not been for their solicitors' mistaken belief that the order appealed against was an order in chambers, and that the one month period would commence from September 30, 1985, *i.e.* the date of issue of the certificate. Although the said notice of appeal had no legal effect even if it had been filed within time, the respondent knew at all material times that the order of September 23, 1985, was being appealed against. Since leave to appeal has been obtained, I am of the opinion that in all the circumstances, there is sufficient ground for granting the appellants leave to appeal out of time.

The Court has accordingly dismissed both the applications to strike out the appeals, and allowed the appellants to file their notice of appeal within ten days from today (January 30, 1986). No order is made as to costs of the applications.

Syed Agil Barakbah S.C.J.: I have the advantage of reading the judgments of both my brother Judges, Mohamed Azmi S.C.J. and Wan Hamzah S.C.J. I agree that the respondent's applications to set aside the appeal of the appellants/plaintiffs be dismissed, that the appellants be allowed to file their notice of appeal within ten days from January 30, 1986 and that there would be no order as to costs. The relevant facts of the case are sufficiently dealt with in the two judgments. There were three grounds in support of the applications, but only one required further consideration. The question is whether rule 56 of the Rules of the Supreme Court 1980 has been complied with and, if not, whether we should extend the time limit for appeal. According to the facts of the present case, the trial Judge heard the respondent's summons-in-Chambers in open Court to consider a preliminary objection raised. He then made an order to strike out the writ of summons and statement of claim and judgment was entered against the appellants in respondent's favour on the counterclaim. The appeal is against that order.

Under rule 56 RSC 1980, no appeal can be brought after the expiration of one month except with leave of the Supreme Court. The commencement of the said period of one month depends on whether the order appealed against falls under paragraph (a), (b) or (c). For the purpose of this case, only paras (a) and (c) are relevant. Rule 56 states:

> "No appeal shall, except by leave of the full Court, be brought after the expiration of one month –
>
> (a) in the case of an appeal from an order in Chambers, from the date when such order was pronounced at the hearing or *after the hearing in open Court* or after the issue of the certificate by the Judge that he requires no further argument, whichever is the later, or when the appellant first had notice thereof;
>
> (b) ....
>
> (c) in all other cases, from the date on which the judgment or order appealed against was pronounced."
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> (Emphasis provided).

With respect, I agree with my brother Judge Mohamed Azmi S.C.J. that the order does not fall under paragraph (a) but under paragraph (c) of rule 56 as an order in open Court for the purpose of calculating the one month period within which to appeal. I say so for the following reasons:-

(1) The learned Judge exercised his discretionary power and directed the summons-in-chambers

to be adjourned and heard in open Court under Order 32 rule 11(1) of the Rules of the High Court 1980. Order 32 rule 11(1) and (2) RHC states:

> "(1) The Judge in Chambers may direct that any summons, application or appeal shall be heard in Court or shall be adjourned into Court to be so heard if he considers that by reason of its importance or for any other reason it should be so heard.
>
> (2) Any matter heard in Court by virtue of a direction under paragraph (1) may be adjourned from Court into Chambers."

(2) The order of Court dated September 23, 1985 is headed "In Open Court" indicating that it was pronounced in open Court and the learned Judge treated it as an open Court matter.

(3) The issue of the Certificate by the learned Judge that he did not require any further argument in open Court in the circumstances of this case was erroneous on the ground that section 68(2) of Courts of Judicature Act 1964 does not apply.

The argument put forward by Mr. Lim Kean Chye, counsel for the appellants, in SCCA 366/85 was that this case should fall under rule 56(a). His contention was that an order in chambers can also be made "after the hearing in open Court" as provided in paragraph (a). With respect, I do not agree. I am inclined to the view that the amendment of rule 56(a) which took effect from August 1, 1980 would appear to be intended by the Rules Committee to accommodate Order 32 rule 11(2) RHC 1980 which came into force on June 1, 1980. The rule gives a discretionary power to the Judge to adjourn the matter back into chambers after hearing in open Court. It follows that any order pronounced by him after the adjournment into chambers becomes an order in chambers. That, in my view, is consonant with the subject of paragraph (a) of rule 56, *i.e.* the appeal from an *order in chambers*, and in so far as the present case is concerned, the venue where the order was pronounced. In the present case, the Judge did not exercise that discretion to adjourn from open Court into Chambers, but pronounced the order in open Court after hearing the arguments also in open Court. Clearly that was an order in open Court and falls under para (c) of rule 56 RSC 1980.

The notice of appeal dated October 28, 1985 was four days out of time since the order was made by the learned Judge on September 23, 1985. For the reasons given by my brother Judge, Mohamed Azmi S.C.J., with which I concur, there is sufficient ground for granting the appellants leave to appeal out of time.

Wan Hamzah S.C.J.: I shall deal with Civil Appeal No. 367 of 1985 first. In the High Court the respondent (defendant) applied by summons-in-chambers for an order that the appellants' (plantiffs') writ and statement of claim be struck out on the grounds stated therein. The learned Judge of the High Court heard the application in open Court and granted the order and also made certain other orders. The appellants filed notice of appeal against the whole of the decision of the learned Judge and took other steps in connection with the appeal. Now the respondent has filed a motion for an order that the appeal be dismissed on the following grounds:

(i) the appellants failed to comply with section 68(1) (a) of the Courts of Judicature Act, which provides that no appeal shall be brought to the Supreme Court when the amount or value of the subject-matter at the trial is less than one hundred thousand dollars, except with the leave of the Supreme Court or a Judge of the High Court;

(ii) the appellants failed to comply with rule 56 of the Rules of the Supreme Court in that the notice of appeal was filed out of the time prescribed in that rule;

(iii) the appellants failed to comply with rule 62 of the Rules of the Supreme Court in that they did not specify the grounds of appeal nor the points of law or fact alleged to have been wrongly decided.

The following are the relevant facts –

23.9.1985:

The learned Judge heard in open Court the respondent's application to strike out the appellants' writ and statement of claim and granted the order. The order was extracted as an open court order.

25.9.1985:

The appellants applied for hearing of further argument.

30.9.1985:

The learned Judge gave a certificate that no further argument was required.

24.10.1985:

The appellants filed an *ex parte* summons-in-chambers in the High Court praying for certain orders of which the following are the relevant ones:-

(a) leave to appeal to the Supreme Court of Malaysia be granted;

(b) the time to appeal be extended;

(c) the time to file and serve the memorandum of appeal be extended.

28.10.1985:

The appellants filed notice of appeal.

1.11.1985:

The learned Judge made certain orders on the appellants' summons-in-chambers of which the following are the relevant ones:-

(a) "that leave to appeal to the Supreme Court of Malaysia be and is hereby granted".

(b) "that the time to appeal be and is hereby extended".

(c) "that the time to file and serve the memorandum of appeal be and is hereby extended".

10.12.1985:

The appellants filed record of appeal which included memorandum of appeal.

At the hearing of the motion before us on January 30, 1986 Miss Liza Chan for the respondent informed the Court that the *ex parte* orders of November 1, 1985 had been served only on January 24, 1986 and therefore the respondent had no time to apply to set them aside. However, as regards order (a) above she stated that she had no objection to it, and thus ground (i) of the motion before us was dropped. As regards order (b) I agree with Miss Chan that the High Court has no jurisdiction to make such order. It is clear from rule 56 that only the Supreme Court sitting as full Court can grant such leave. As regards order (c) I agree with Miss Chan that the High Court has no jurisdiction to make such order and that only the Supreme Court has the jurisdiction, *vide* rule 62(7).

As regards ground (ii) that the notice of appeal was filed out of time, it was contended on behalf of the respondent that since the order to be appealed against was an open court order the notice of appeal should have been filed not later than one month after the date of the order, and since it was filed on October 28, 1985 it was out of time. It was further contended on behalf of the respondent that it was not necessary to apply for further argument and to wait for a certificate from the Judge that he required no further argument, before filing the notice of appeal. On behalf of the appellants it was contended that in view of rule 56(a) as it is now worded after the 1980 amendment it is still necessary to obtain such certificate even though the hearing was held and the decision was pronounced in open court. It was submitted that since the certificate was issued on September 30, 1985, notice of appeal could be filed within one month after that date. Rule 56(a) reads:

"No appeal shall, except by leave of the full Court, be brought after the expiration of one month –

(a) in the case of an appeal from an order in Chambers, from the date when such order was pronounced at the hearing or after the hearing in open Court or after the issue of the certificate by the Judge that he requires no further argument, whichever is the later or when the appellant first had notice thereof;"

Section 68(2) of the Courts of Judicature Act provides for the requirement of a certificate by the Judge that he requires no further argument, only in a case where he has made an order in Chambers. There is no requirement in the Act for such certificate after the Judge has made an order in open Court after hearing in open Court. To construe rule 56(a) in the way advocated by the counsel for the appellants would be tantamount to disregarding the provisions of the Act. Even if there was inconsistency between any provisions of the Rules with the provisions of the Act, the latter shall prevail. I think it would help to explain the meaning of rule 56(a) if the same and exact words of that rule are set out compartmentally as follows:

"56. No appeal shall, except by leave of the full Court, be brought after the expiration of one month –

(a) in the case of an appeal from an order in Chambers, from the date –

(1) (i) when such order was pronounced at the hearing or after the hearing in open Court or

(ii) after the issue of the certificate by the Judge that he requires no further argument,

Whichever is the later, or

(2) when the appellant first had notice thereof."

The words "at the hearing" above obviously mean at the hearing in Chambers. So if an order is pronounced on a certain date at the hearing in Chambers and the Judge requires no further argu-

ment, the "later date" is the date of the issue of the certificate. If an order is pronounced on a certain date after a hearing in open Court there is no necessity to apply for further argument in open Court and the "later date" should be the date when the order is pronounced after the hearing in open Court, and the present case is such a case. Although under rule 56(a) such order is termed as an order in Chambers, for the purpose of section 68(2) it is not an order made in Chambers.

In the present case since the order was pronounced on September 23, 1985 the notice of appeal should have been filed not later than October 24, 1985. Since it was filed on October 28, 1985 it was out of time. But since the delay was of four days only and there is some difficulty in interpreting rule 56(a) I would allow the appellants to file a fresh notice of appeal within ten days from this order. In view of this, ground (iii) of the respondent's motion is not important or applicable any more. I agree that the motion be dismissed with no order as to costs.

There is also a motion for the dismissal of Civil Appeal No. 366 of 1985 on similar grounds. The facts relating to Civil Appeal No. 366 of 1985 are similar to the facts in this case. I agree that similar orders be made in respect of that appeal.

Order accordingly.

Solicitors: *H.L. Sharma; Yep, Yeo & Nasrim*

DOL BIN LASIM v. PUBLIC PROSECUTOR

MOHAMED SHARIF BIN MATAN v. PUBLIC PROSECUTOR

[S.C. (Lee Hun Hoe C.J. (Borneo), Seah & Syed Agil Barakbah S.C. JJ.) February 6 & June 28, 1986]

[Kuala Lumpur – Supreme Court Criminal Applications Nos. 24 & 25 of 1985]

Criminal Law and Procedure – Acquittal in Sessions Court – Appeal to High Court – Whether High Court can call for a demonstration by chemist – Chemist not affirmed or on oath – Additional evidence when admissible – Additional evidence must comply with provisions of the Criminal Procedure Code – Criminal Procedure Code (F.M.S. Cap. 6), s. 317(i).

Evidence – Additional evidence – Admissibility – Compliance with provisions of the Criminal Procedure Code.

In this case the applicants had been charged with offences under the Prevention of Corruption Act, 1961. The learned President of the Sessions Court acquitted and discharged the applicants at the end of the prosecution case on the 1st charge. He called them for their defence on the 2nd charge and eventually after hearing the defence acquitted them. On appeal the learned Judge of the High Court called the chemist to demonstrate the effect of anthracene powder on documents. He subsequently allowed the appeal and found the applicants guilty on the 2nd charge.

The applicants applied for leave to refer several questions to the Supreme Court and the Supreme Court allowed one question as follows:

"In the appeal against acquittal from the decision of the Subordinate Court to the High Court can the High Court call for a demonstration by a chemist and if so whether the High Court can disregard the result and/or effect of the demonstration in its judgment."

Held: (1) the learned Judge in this case had considered the result and effect of the demonstration but there was no evidence that the chemist in this case was sworn or affirmed nor was there evidence to show whether the parties were given the opportunity to examine the chemist;

(2) an appellate court should be slow to substitute its own view of the facts for that of the trial Judge and therefore in this case the order of the learned President should be restored.

Cases referred to:

(1) *Ramli bin Kechik* v. *Public Prosecutor* [1986] 2 M.L.J. 33.
(2) *Mohamed bin Jamal* v. *Public Prosecutor* [1964] M.L.J. 254.
(3) *R.* v. *Parks* [1961] 3 All E.R. 633, 634; [1961] 1 W.L.R. 1484.
(4) *Yue Sang Cheong Sdn. Bhd.* v. *Public Prosecutor* [1973] 2 M.L.J. 77.
(5) *Lim Kheak Teong* v. *Public Prosecutor* [1985] 1 M.L.J. 38.
(6) *Mat* v. *Public Prosecutor* [1963] M.L.J. 263.
(7) *Nadarasa* v. *Public Prosecutor* [1972] 2 M.L.J. 47.
(8) *Tan Chow Soo* v. *Ratna Ammal* [1969] 2 M.L.J. 49, 51.

SUPREME COURT.

Christopher Fernando for the applicant in Application No. 24 of 1985.

V. Balasingam for the applicant in Application No. 25 of 1985.

Gooi Soon Seng, (Dy. Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Lee Hun Hoe C.J. (Borneo) (delivering the Judgment of the Court): The applicants applied for leave to refer several questions under section 66(1) of the Courts of Judicature Act, 1964. After hear-